

ADVISORY OPINION 2006-003

Any advisory opinion rendered by the Registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is required. KRS 121.135(4).

May 19, 2006

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Dear Mr. Harvey:

We received your written request for an advisory opinion on April 28, 2006, on behalf of your client, the Kentucky Tort Reform Association, Inc., which operates under the name of the Kentucky Civil Justice Alliance ("KCJA").

In your request, you provided us the following facts: KCJA is a not-for-profit Kentucky corporation with a membership consisting of both for-profit and not-for-profit foreign and domestic corporations. KCJA is funded by membership dues and may also accept contributions from its membership.

KCJA plans to engage in public information advertising by means of print and electronic media concerning certain candidates for judicial office in Kentucky. Such communications will refer to clearly identified judicial candidates and their qualifications, experiences, and virtues, but will not expressly advocate their election or defeat. In other words, voters will not be asked to "elect," "support," "cast ballots for," "defeat," "reject," or any other such "magic words" as identified by the U.S. Supreme

Court in Buckley v. Valeo, 424 U.S. 1 (1976). In addition, KCJA will not coordinate its efforts with any of the candidates and campaigns identified in the communications or with their opponents.

Accordingly, you have raised the following questions concerning this public information advertising.

- (1) What constitutes “aiding, assisting, or advancing any candidate for public office” and “express advocacy” within the meaning of KRS Chapter 121 and the regulatory jurisdiction of the Registry?

Section 1(2) of 32 KAR 2:060 provides that advisory opinion requests presenting a general question of interpretation will not be considered. However, based on your letter in its entirety, we understand that you are specifically concerned over whether the proposed public information advertising would constitute express advocacy under current Kentucky law and whether the statutory prohibition on the use of corporate funds under KRS 121.035 applies to KCJA’s advertising.

(a) Express Advocacy Standard

As discussed in more detail in KREF Advisory Opinion 2006-001, the Registry has confirmed that the “express advocacy” standard as set forth under Buckley is the proper standard for analysis of the disclosure and reporting requirements under KRS Chapter 121. In Buckley, the U.S. Supreme Court construed the expenditure limitations and disclosure and reporting requirements under federal law “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” Buckley, 424 U.S. at 80. To avoid vagueness and overbreadth, a bright statutory line was established to separate “express advocacy” from “issue advocacy.” McConnell v. Federal Election Comm’n, 540 U.S. 93, 126 (2003). Under this bright-line test, the Court identified examples of certain “magic words” that are essential in determining express advocacy, such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” or “reject.” Buckley, 424 U.S. at 44, fn 52. Subsequent cases have consistently limited the regulation of political speech to those expenditures constituting express advocacy. See e.g., First National Bank of Boston v. Belotti, 435 U.S. 765 (1978); and Federal Election Comm’n v. Massachusetts Citizens For Life, 479 U.S. 238 (1986). Communications which do not constitute express advocacy, as defined by this test, are considered constitutionally-protected First Amendment speech and may not be subject to government regulation. This is based on the fact that “the government may not regulate a broader class of speech than is necessary to achieve its significant interest.” Anderson v. Spear, 356 F.3d 651, 665 (6th Cir. 2004).

As described, the proposed public information advertising does not explicitly call for the readers or viewers to vote for or against a clearly identified judicial candidate. Therefore, the advertising proposed by KCJA does not expressly advocate the election or

defeat of a candidate as set forth in Buckley and would not fall within the constitutionally-limited circumstances under which the Registry may regulate political speech. For that reason, provided the communications do not go beyond issue discussion to express electoral advocacy as illustrated in Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), KCJA would not be subject to registration or reporting based solely on such public information advertising.

(b) Use of Corporate Funds

Under Section 150 of the Kentucky Constitution and KRS 121.025, a corporation is prohibited from contributing, directly or indirectly, or otherwise giving anything of value to a candidate for public office in Kentucky. In addition, KRS 121.150(21) prohibits a candidate or committee from accepting a contribution from a corporation, directly or indirectly. The prohibitions against making and receiving corporate contributions apply to both monetary and in-kind contributions.

However, as discussed above, the Registry has limited regulatory authority over political communications pursuant to Buckley. The protected First Amendment rights are not diminished merely because the issue advocacy emanates from a corporate entity. As quoted in Kentucky Registry of Election Finance v. Louisville Bar Association, 579 S.W.2d 622, 627 (Ky.App. 1978):

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.

The activity that KCJA proposes – expending corporate funds on advertising which does not expressly advocate the election or defeat of any candidate - would not fall within the regulatory jurisdiction of the Registry. Therefore, provided the proposed public information advertising does not go beyond issue discussion to express electoral advocacy and KCJA does not otherwise give any money, service, or value to any candidate, KCJA would not be in violation of KRS 121.025 or Section 150 of the Kentucky Constitution.

- (2) Would KCJA be regarded as a “permanent committee” under KRS 121.015(3) and required to register?

KRS 121.015(3)(d) defines a permanent committee as:

a group of individuals, including an association, committee or organization, other than a campaign committee, political issues committee, inaugural committee, caucus campaign committee, or party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose expressly advocating the election or defeat of one (1) or more clearly identified candidates, slates of candidates, or political parties, which functions on a regular basis throughout the year.

(Emphasis added.)

Based on the facts provided in your request, the public information advertising in question does not explicitly call for the readers or viewers to vote for or against a clearly identified candidate. Therefore, the communications proposed by KCJA do not expressly advocate the election or defeat of a candidate as set forth under Buckley and would not fall within the constitutionally-limited circumstances under which the Registry may regulate political speech. So long as the advertisements described in your request do not extend beyond issue discussion to express electoral advocacy, KCJA would not be subject to registration and reporting as a permanent committee based solely on the described communications.

- (3) Must KCJA include a disclaimer on the advertising pursuant to KRS 121.190(1)?

KRS 121.190(1) provides, in relevant part, that:

[a]ll newspaper or magazine advertising, posters, circulars, billboards, handbills, sample ballots, and paid-for television or radio announcements, which expressly advocate the election or defeat of a clearly identified candidate, slate of candidates, or group of candidates for nomination or election to any public office shall be identified by the words “paid for by” followed by the name and address of the individual or committee which paid for the communication; except that if paid for by a candidate, slate of candidates, or campaign committee, it shall be identified only by the words “paid for by” followed by the name of the candidate, slate of candidates, or campaign committee, whichever is applicable.

(Emphasis added.)

Since the public information advertising does not expressly advocate the election or defeat of a candidate as set forth under Buckley, KCJA would not be subject to regulation under Kentucky's disclaimer statute of KRS 121.190(1). However, please keep in mind that television or radio announcements must also comply with the Federal Communication Commission's statutes and regulations.

(4) What constitutes an "independent expenditure" as defined in KRS 121.015(12)?

As mentioned above, 32 KAR 2:060, Section 1(2), provides that advisory opinion requests presenting a general question of interpretation shall not be considered. Again, based on your letter in its entirety, we conclude that you are specifically concerned over whether the purchase of the public information advertising in question would fall under the reporting requirements of an independent expenditure.

KRS 121.015(12) defines an independent expenditure as:

the expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them, and which is not made in concert with, or at the request or suggestion of any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them.

(Emphasis added.)

As discussed above, the proposed public information advertising does not expressly advocate the election or defeat of a candidate as set forth under Buckley. Accordingly, the payments for such communications would not constitute independent expenditures as defined under KRS 121.015(6) and KCJA would not be subject to the reporting requirements of KRS 121.150(1).

(5) Would KCJA be obligated by law to make public a list of its members or a list of contributors to its public information communications?

The communications, as described, do not expressly advocate the election or defeat of a candidate as set forth under Buckley and, therefore, would not fall within the constitutionally-limited circumstances under which the Registry may regulate political speech. So long as the advertisements described in your request do not extend beyond issue discussion, KCJA would not be subject to registration and reporting, including the

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disclosure of any membership or contributor lists, based solely on the described communications.

Please keep in mind that this advisory opinion is based on the specific facts set forth in your written request. If you have any questions concerning this advisory opinion, please do not hesitate to contact the Registry. Thank you.

Very truly yours,

Connie L. Verrill
General Counsel